

- (1) Whether claimant's thoracic injuries arose out of and in the course of her employment with respondent.
- (2) Whether certain defenses apply.
- (3) Whether the Administrative Law Judge exceeded his jurisdiction pursuant to K.S.A. 44-551(b)(2)(A).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

Respondent does not contest the fact that claimant suffered accidental injury arising out of and in the course of her employment on March 14, 1994. The issue in dispute deals with whether claimant's injury was to her lumbar spine, thoracic spine, or both. The dispute regarding the area of injury was clearly in contention at the time of preliminary hearing on March 11, 1997. The parties presented contradictory evidence regarding both the lumbar and thoracic spines and the dispute regarding medical treatment for both.

In the original Order of March 11, 1997, the Administrative Law Judge granted claimant treatment with Dr. Philip Mills for all treatment, tests, and referrals except for referrals to rehabilitation hospitals. The Administrative Law Judge went on to state:

"The Court finds that the Claimant's complaints of injury to the lumbar region were documented shortly after her accident and that the Respondent has abandoned treatment allowing the Claimant to select a physician of her choice, in this case Dr. Philip Mills."

The original Order of March 11 failed to mention claimant's thoracic region. In the Order Nunc Pro Tunc of March 13, 1997, the Administrative Law Judge amended the Order after receiving a letter from claimant's attorney requesting clarification as to the thoracic spine. The Order Nunc Pro Tunc granted Dr. Mills authorization for "all treatment, tests and referrals for both the lumbar and thoracic regions, except referrals to rehabilitation hospitals."

Respondent contends the Administrative Law Judge exceeded his jurisdiction in altering the Order and submitting the Order Nunc Pro Tunc. Respondent further contends claimant's thoracic injury did not arise out of and in the course of her employment but instead stems from an injury suffered while claimant was shopping with her daughter in a hospital gift shop on September 22, 1994, when she bent over to pick up a card and felt a dramatic increase in pain.

The Appeals Board must first consider whether the Order Nunc Pro Tunc of the Administrative Law Judge was appropriate.

The purpose of an order Nunc Pro Tunc is to provide a means for entering the actual judgement of the trial court which for one reason or another was not properly recorded. Wallace v. Wallace, 214 Kan. 344, 520 P.2d 1221 (1974). It may not be made to correct a judicial error involving the merits, to enlarge the judgment originally rendered, to supply a judicial omission, or to show what the court should have decided, as distinguished from what it actually did decide. Book v. Everitt Lumber Co., Inc.,

218 Kan. 121, 542 P.2d 669 (1975). Overall, the Court is under the duty to make their judgment reflect their intent. If a correction entails a new finding, it is prohibited. Norcross v. Pickrell Drilling Co., 202 Kan. 524, 449 P.2d 569 (1969).

The original order issued on March 11, 1997, makes no mention of claimant's thoracic back even though it was clearly at issue, but does specifically discuss the lumbar region of claimant's back. After claimant's attorney contacted the Administrative Law Judge requesting clarification regarding the thoracic injuries the Judge issued the Order Nunc Pro Tunc. In issuing the Order Nunc Pro Tunc the Administrative Law Judge has done no more than correct what appears to be a clerical error. As such, the Appeals Board finds the Nunc Pro Tunc order of March 13, 1997, was appropriate and the Administrative Law Judge did not exceed his jurisdiction pursuant to K.S.A. 44-551(b)(2)(A) in correcting the original order of March 11, 1997. As such, the Appeals Board finds the Order Nunc Pro Tunc of March 13, 1997, and the Order of March 11, 1997, should be, and are hereby, affirmed.

Respondent further alleges that claimant's thoracic spine involvement is the result of a new injury. Respondent admits that claimant suffered accidental injury arising out of and in the course of her employment on the date alleged. The Appeals Board finds the dispute between lumbar spine and the thoracic spine involvement, rather than being an argument centering around whether claimant suffered accidental injury arising out of and in the course her employment, is instead, an argument regarding the nature and extent of claimant's injury and/or disability. As such, the Appeals Board finds it is not within the Appeals Board's jurisdiction to consider this issue under either K.S.A. 44-534a or K.S.A. 44-551.

Respondent further alleges certain defenses apply in this matter. While respondent raises the issue of certain defenses in its appeal, it does not argue nor explain its reasoning in its brief. The Appeals Board has held in the past and continues to hold that the phrase "certain defenses" is analogous to some defenses as opposed to any defenses or all defenses. The word "certain" as used in K.S.A. 44-534a is intended to limit the type and character of defenses which can be said to give rise to Appeals Board jurisdiction. For insight into the "certain defenses" contemplated by the statute, the Appeals Board looks to other issues specified in K.S.A. 44-534a, which, if disputed, are considered jurisdictional. They include whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment and whether notice is given or claim timely made. What these jurisdictional issues have in common is that they all go to the compensability of the claim. For a workers compensation claim to be compensable, each and every one of the issues listed, if disputed, must be proven by claimant before he/she can recover any benefits under the Workers Compensation Act. The Appeals Board has previously held, and reaffirms herein, that the "certain defenses" contemplated by K.S.A. 44-534a are defenses which go to the compensability of the claim; such as, willful failure to use a guard or the intoxication defense. The Appeals Board finds

the respondent has failed to prove that "certain defenses" apply to this matter and, therefore, respondent's appeal on this issue is dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated March 11, 1997, and the Order Nunc Pro Tunc of March 13, 1997, should be, and are hereby, affirmed in all respects and remain in full force and effect.

Dated this ____ day of June 1997.

BOARD MEMBER

c: Charles W. Hess, Wichita, KS
Vincent A. Burnett, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director